Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the law of the case doctrine bar appellate review of an order authorizing disbursement to the United States of America of funds derived from a reward, granted under 26 U.S.C. § 7623, *Expenses of detection and punishment of frauds,* in partial satisfaction of a prior contempt fine, for the failure to obey a bankruptcy court's order to turn over the sale proceeds of personal property to Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, inasmuch as this Court's opinion that the trustee was not the fiduciary of a bankruptcy estate, *Holywell Corporation v. Smith,* 503 U.S. 47, 55 (1992), required the conclusion that the bankruptcy court was not a court of competent jurisdiction to resolve controversies unrelated to the claims of creditors under title 11 after the administration of the bankruptcy estate ended as an effect of confirmation in accordance with 11 U.S.C. § 1141(a)?

Does the "law of the case" doctrine bar appellate review as clearly erroneous and a violation of the Due Process Clause of a prior contempt judgment, entered in a summary proceeding in favor of the United States of America, in the guise of a coercive civil contempt fine, imposed to vindicate the court's authority without presentment or indictment of a Grand Jury, and a jury trial, and prior to a purgation hearing to determine the contemnor's ability to obey the court's order to turn over funds previously disbursed to pay attorney's fees incurred to seek a petition for a writ of certiorari to the opinion of the United States Court of Appeals for the Eleventh Circuit, cited as *In re Holywell Corp.,* 911 F.2d

QUESTIONS PRESENTED – Continued

1539, 1545 (11th Cir. 1990), which relieved Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, of his duty as a fiduciary to pay income taxes attributable to the liquidating trust's taxable income in accordance with 26 U.S.C. § 641(b) and imposed such income taxes on the contemnor?

Does the "law of the case" doctrine bar appellate review of a prior contempt judgment, as a manifest injustice and a violation of the Excessive Fines Clause, which was entered in favor of the United States of America as a flat unconditional fine of $1,331,000, for the failure to obey a district court's order to turn over $66,500 to Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust?

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PETITION FOR A WRIT OF CERTIORARI

Theodore B. Gould, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. 1-2), styled as *Theodore B. Gould v. Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, United States of America, and Holywell Corporation*,[1] is unpublished. The court of appeals' denial of rehearing and rehearing *en banc* (App. 58-59) has not been reported. The district court's order denying the petitioner's Fed.R.Civ.P. Rule 59(a)(2) motion for a new trial, entered on January 25, 1999 (App. 5-7), has not been reported. The district court's amended order, authorizing disbursement of $93,198.65 to the United States of America (App. 8-9), in partial satisfaction of a prior contempt judgment, in the amount of $1,331,000, has not been reported. The district court's order granting the motion of the United States for disbursement of the funds in the Court Registry (App. 10-11) has not been reported. The district court's order granting the motion of Fred Stanton Smith, as trustee of the Miami

[1] Holywell Corporation ("Holywell") was *not* a party to this case and had no interest in the proceeds of the sale of the property, which was the subject of the contempt proceedings in the lower courts.

Center Liquidating Trust,[2] ("Smith") to interplead funds, in the amount of $93,198.65, to the Court Registry (App. 12-13), entered on October 13, 1998, has not been reported. The district court's order granting the joint motion of the United States Attorney for the Southern District of Florida and Smith to deposit $84,516.82, which the Internal Revenue Service ("IRS") granted to me under 26 U.S.C. § 7623, *Expenses of detection and punishment of frauds*, in an interest bearing account held in the name of Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust (App. 16-17), has not been reported. The district court's order granting the motion of the United States to deposit the IRS reward in the Court Registry (App. 18-19) has not been reported. The prior opinion of the court of appeals, entered on November 17, 1994, (App. 20-21), affirming the district court's contempt order, has not been reported. The district court's opinion and contempt judgment, in the amount of $1,331,000, plus interest, entered in favor of the United States on August 31, 1993 (App. 22-36), has not been reported. The opinion of the court of appeals, entered on July 6, 1992 (App. 37), affirming the district court's contempt fine, entered in favor of Smith and the Bank[3] has not been reported. The district court's order denying a stay and rehearing of its

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[2] The Bank of New York ("Bank") caused the creation of the Miami Center Liquidating Trust ("liquidating trust") and Smith's appointment as the liquidating trust's trustee under the provisions of the Bank's amended plan, which the bankruptcy court had previously confirmed. See *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985).

[3] The Bank had *no* interest and lacked standing in these proceedings.

contempt fine, entered in favor of Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust (App. 38-43) has not been reported. The district court's contempt order (App. 44-53), entered for the failure to turn over $66,500 to Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, on May 17, 1991, has not been reported. The bankruptcy court's order finding Theodore B. Gould in criminal contempt (App. 54-57) and certifying the proceedings to the district court under Bankruptcy Rule 9020(a) has not been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1999 (App. 1), and a timely suggestion of rehearing *en banc* (which is treated by the Eleventh Circuit as a petition for rehearing as well, 11 Cir. R. 35-6), was denied on March 2, 2000 (App. 58). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the U.S. Constitution involved in this petition for a writ of certiorari are appended herein at App. 60.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this petition for a writ of certiorari are appended herein commencing at App. 61.

STATEMENT

This contempt proceeding is directly related to the case in the lower courts that resulted in this Court's opinion, cited as *Holywell Corp. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021 (1992). The pertinent history of the proceedings in which the court of appeals held, contrary to the plain language of 26 U.S.C. § 641(b),[4] that "the reorganized debtor, not the liquidating trustee is responsible for such [Miami Center Liquidating Trust's income] taxes," *In re Holywell Corp.*, 911 F.2d 1539, 1545 (11th Cir. 1990), is explained in this Court's *Holywell* opinion.

The record of the proceedings in the courts below are not in dispute and the facts are uncontroverted:

1. The Bank's plan was confirmed without a confirmation hearing, and there was no hearing concerning

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[4] 26 U.S.C. § 641(b), *Computation and payment*, provides, in part:

> The taxable income of an estate or trust shall be computed in the same manner as in the case of an individual, except as provided in this part. The tax shall be computed on such taxable income and shall be paid by the fiduciary. . . .

my objections, in violation of 11 U.S.C. § 1128,[5] which the bankruptcy court held "lacked merit," 54 B.R. at 43, that (a) the Bank's disclosure statement did not provide adequate information concerning the plan's tax consequences to satisfy 11 U.S.C. § 1125, see *Smith v. Bank of New York*, 161 B.R. 302, 307 (Bkrtcy. S.D. Fla. 1993) (the Bank was liable for negligent misrepresentation as the plan's proponent); (b) the Bank's representations were false concerning the plan's feasibility, in violation of 11 U.S.C. § 1129(a)(11), see 161 B.R. at 307 ("the bank's representations concerning the feasibility of the plan . . . were materially false"); (c) the Bank's plan wrongfully subordinated the valid claims of insiders with a superior priority to its liens, in violation of 11 U.S.C. § 1129(a)(1), see *In re Holywell Corp.*, 913 F.2d 876, 880 (11th Cir. 1990) ("if the classification scheme violates basic priority rights, the plan cannot be confirmed"); and (d) the substantive consolidation provision of the Bank's plan provided for the fraudulent conveyance of property without compensation[6] and the elimination of the repayment of loans

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[5] 11 U.S.C. § 1128 provides:

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) A party in interest may object to confirmation of a plan.

[6] The Report of the Internal Revenue Service on ***Holywell Corporation & Subsidiaries***, issued on July 14, 1992, imposed penalties for negligence upon Smith under §§ 6653(a), 6662 and 6651(a)(1) of the Internal Revenue Code, and concluded that "the evidence strongly indicates that the [Bank's] Plan of Reorganization was calculated to avoid the payment of income tax," included, *inter alia*, "[t]he conveyance of the property of Holywell Telecommunications Company and Holywell Leasing Company without consideration. . . . "

secured by "super-priority" liens, that the bankrutpcy court had previously authorized in accordance with 11 U.S.C. § 364(c).[7]

2. The Bank falsely represented in the amended consolidated disclosure statement of its proposed plan that the Bank's cash collateral included the proceeds derived from the sale of properties located in northern Virginia and Washington, D.C., as "a first security interest in approximately $32,422,798 in cash," *Amended Disclosure Statement* at 1.[8] See 161 B.R. at 304 ("the assets of the (Liquidating) Trust also included, *inter alia*, the gross proceeds from the sale of the Washington properties (even though the order on the bank's cash collateral extended only to the net proceeds).")[9]

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[7] See **S.Ct. No. 99-1644** (The original presiding bankruptcy judge held that "I would not have confirmed a plan nullifying the 1985 orders ['super-priority' loans]." Nevertheless, the trustee failed to repay the loans in reliance on the Bank's indemnity and paid the Bank for claims subordinate to the priority of the liens securing repayment of the "super-priority" loans.)

[8] The bankruptcy court's Cash Collateral order, entered on the Bank's motion on December 31, 1984, required that "all obligations to the Internal Revenue Service are determined and paid," see **S.Ct. No. 99-1643** at App. 68. Nevertheless, "the bank failed to include any analysis of the tax consequences . . . in its disclosure statement or any provision for payment of taxes in its plan," 161 B.R. at 307.

[9] See *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992) [After this Court's *Holywell* opinion was entered, the court of appeals affirmed the district court's imposition of a civil contempt fine against me, payable in the amount of $67,412.50 to the trustee and $71,214.90 to the Bank, for the reimbursement of attorneys' fees and expenses to defend against lawsuits which I caused to be filed on or about August 4, 1987, by Holywell's nondebtor

3. The trustee sought the Bank's indemnity, holding himself harmless for the failure to discharge duties imposed on fiduciaries under the provisions of the Internal Revenue Code, 161 B.R. at 306.

4. After the Bank agreed to indemnify Smith, the trustee conspired with the Bank's attorneys to cause dismissal, as moot, of the appeal of the bankruptcy court's order confirming the Bank's amended plan and commenced distribution under the plan's provisions,[10] without seeking the bankruptcy court's instructions, with notice to interested parties, concerning difficult questions of judgment. Compare, *Mosser v. Darrow*, 341 U.S. 267 (1951).[11]

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subsidiaries in the United States District Court for the Western District of Virginia, alleging that the trustee's failure to pay income taxes attributable to the sale of their assets, in reliance on the Bank's indemnity, prior to the dividend distribution of their cash to the liquidating trust to pay the claims of creditors against the estate of Miami Center Limited Partnership ("MCLP"), was a breach of trust.] Compare 503 U.S. at 58 ("The respondents finally assert that the trustee may ignore the duties imposed by §§ 6012 and 6151 because the Chapter 11 plan does not require him to pay taxes. . . . We disagree.")

[10] See Restatement (2d) *Trusts*, § 168(2) ["The trustee is under a duty to the beneficiary *not* to comply with a term of the trust which he knows or should know is illegal, if such compliance . . . would be injurious to the interest of the beneficiary."] See also Bogert, *Trusts* (6th ed.) at 15 ["The causes for the invalidity of a trust's creation are conveyances induced by fraud, mistake. . . . "] Thus, the trustee must wear a *badge of fraud* for reliance on the Bank's indemnity to pay money to the Bank.

[11] This Court held that "[t]he most effective sanction for good administration is personal liability. . . . The practice is well established by which trustees seek instructions from the court,

5. The Bank's intent in creating the Miami Center Liquidating Trust was to relieve the trustee of the payment of income taxes and the Bank agreed to indemnify the trustee for the fraudulent purpose, *inter alia*, of imposing the liquidating trust's income taxes on me.[12]

6. The trustee conspired with the Bank's fraudulent scheme to impose the Miami Center Liquidating Trust's income taxes on me, and after the court of appeals held that the plan's substantial consummation precluded judicial relief, as moot, of the bankruptcy court's order confirming the Bank's plan, *Miami Center Limited Partnership v. Bank of New York*, 820 F.2d 376, 379 (11th Cir. 1987), the trustee filed an adversary complaint in the bankruptcy court against the United States, Holywell, and me under the Declaratory Judgment Act, 28 U.S.C. § 2201,[13] and

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given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment." 341 U.S. at 274.

[12] In the prior proceedings before this Court, the Bank's intent was described as follows:

> [I]t would be inequitable to require an individual or entity to file returns and pay taxes *where that individual or entity lacks authority to do so under a reorganization plan sanctioned by the bankruptcy court.* (Emphasis added) The result . . . would require the Liquidating Trustee to *violate the terms of the trust agreement.* (Emphasis added)

S.Ct., *Brief In Opposition Of Respondent The Bank of New York*, April 30, 1991, at 9. Compare 26 U.S.C. § 641(b); also, 7, n. 10, *supra*.

[13] 28 U.S.C. § 2201, ***Creation of remedy***, provides, in part:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought [in] . . . a proceeding under

sought the bankruptcy court's exercise of subject matter jurisdiction under 28 U.S.C. § 1334(a), 28 U.S.C. § 157, and Bankruptcy Rule 7001(a), and an order requiring me to file the tax return for the liquidating trust, see 503 U.S. at 52 ("The Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return.")

7. My answer was that a bankruptcy court's post-confirmation jurisdiction was limited to the resolution of controversies concerning the preconfirmation claims of creditors under title 11 and a bankruptcy court lacked authority to grant declaratory relief as a final order or judgment concerning postconfirmation income taxes. See 503 U.S. at 59 ["Even if § 1141(a) binds creditors . . . with respect to claims that arose before confirmation, we do not see how it can bind the United States . . . with respect to postconfirmation claims."]

8. During the trial of the tax case before the bankruptcy court on February 11, 1988, the trustee conceded that he was *not* a bankruptcy trustee[14] and that the Bank's

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> Section 505 or 1146 of title 11 . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[14] See **S.Ct. No. 99-1643** at 5, n. 8 ("In *Holywell*, it was the Government's position that the trustee was a 'trustee in a case under title 11'. . . . Since a bankruptcy court does have jurisdiction over a bankruptcy trustee's tax liability, the Government did not initially contest the bankruptcy court's jurisdiction. The Supreme Court did not adopt the

plan did not relieve him of the duties imposed on fiduciaries under the applicable provisions of the Internal Revenue Code. Nevertheless, the bankruptcy court's judgment, which was drafted by the trustee's attorney, held that the trustee was not "a fiduciary and, as such, he is not subject to tax liability," *In re Holywell Corp.*, 85 B.R. 898, 901 (Bkrtcy. S.D. Fla. 1988), and also that I was personally liable for the Miami Center Liquidating Trust's income taxes, *Id.* at 902.

9. Under the provisions of the Bank's plan, the trustee was required to sell the property of my estate transferred to the Miami Center Liquidating Trust, Article V, ***Creation Of Trust***, (d), but the trustee's sale of the concrete pumps would have been direct evidence that the trustee's testimony during the tax case was false:

> STETTIN: Have you done anything except hold title to the money and determined the validity, priority and amount of the claims against the consolidated debtors?
>
> SMITH: That's all I have done.

Bkrtcy. S.D. Fla., *Transcript*, February 11, 1987, at 87. Compare 503 U.S. at 57 ("They assert that the trustee merely acted as a 'disbursing agent' who distributed liquidating funds to creditors.")

10. The sale of the concrete pumps caused ordinary taxable income of $66,500, under 26 U.S.C. § 1245, which I was required to report for the taxable year ended December 31, 1989, under the bankruptcy court's judgment that the trustee was not required to file an income tax return

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Government's view. . . . ") 503 U.S. at 55 ["The trustee . . . is not acting as the fiduciary of Gould's bankruptcy estate."]

in accordance with 26 U.S.C. § 6012(b)(4), and that I was liable for the payment of the Miami Center Liquidating Trust's income taxes under the rules for grantor trusts. 85 B.R. at 902.

11. On August 1, 1989, the bankruptcy court entered a civil contempt order, drafted by the trustee's attorney, and imposed a daily coercive fine of $1,000 against me, in the event that I did not turn over the net sale proceeds of the concrete pumps to the trustee by August 4, 1989, App. 56. In addition, the bankruptcy court certified a criminal contempt to the district court under Bankruptcy Rule 9020(a) and (b), App. 27, because during a deposition, which I did not disavow in the bankruptcy judge's presence, I stated that "I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes . . . since I considered Judge Weaver's decision with respect to income taxes . . . null and void,"[15] App. 42.

12. On May 17, 1991, the district court entered a contempt order, without a trial and without a purgation hearing to determine my ability to turn over the proceeds derived from the sale of the concrete pumps. The district judge concluded that "[t]he question of whether the Trust must pay taxes is not relevant . . . [because] the Eleventh

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[15] See 5 A *Scott, The Law of Trusts*, § 565, **Whether a Court Has Jurisdiction**, states in part that "[u]nless a court has jurisdiction, it cannot render a valid judgment. . . . [A] court may make an effective decree if it has jurisdiction either over the trustee or over the trust property"; also, *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818, 824 (8th Cir. 1951) [A judgment obtained in a court that lacks jurisdiction is a violation of due process and a nullity.]

Circuit Court of Appeals has determined that the trust does not have the tax obligations Mr. Gould seeks to impose," App. 49, and although "the bankruptcy court concluded that Mr. Gould was found to be in criminal contempt," App. 46, the court instead held that I was "in civil contempt of court," App. 52. The district court relied on the provision of the Bank's plan for the bankruptcy court's retention of jurisdiction postconfirmation, that "the bankruptcy court retains jurisdiction over Mr. Gould . . . in order to enter any order necessary or appropriate to enforce the plan," App. 47.

13. The district court construed my use of the funds derived from the sale of the concrete pumps to pay attorney's fees incurred to file a petition for a writ of certiorari to the opinion of the court of appeals that the trustee was not liable for the payment of income taxes, 911 F.2d at 1547, as a diversion of the funds "for his personal use," App. 41,[16] and found that my use of the funds in October-December 1990 to pay Arnold & Porter's fees "conflicts directly with those he made in the proceedings before the

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[16] See **S.Ct. No. 99-1644**, at 20, n. 27 (The result of Arnold & Porter's "success in the Tax Case [was] . . . only benefit [which] accrued to the taxing authorities and the Discharged Debtors, who otherwise would have been personally liable for the taxes.") Compare Solicitor General Kenneth Starr's argument in the prior proceedings before this Court that:

> [t]he Court of Appeals' decision has the potential for great mischief. The court of appeals has constructed out of whole cloth a new tax exempt entity – the liquidating trust – that creditors may use to maximize their distributions in bankruptcy at the expense of the public fisc.

S.Ct., *Reply Brief For The United States*, October 1991 at 16.

bankruptcy court at which time [July 1989] he stated that the proceeds . . . had been invested in GMAC 30 day paper at 9.21 percent interest," App. 41.[17] The court of appeals affirmed without a written opinion on July 6, 1992, App. 37, and this Court denied a petition for a writ of certiorari.

14. On August 31, 1993, the district court entered a "[f]inal judgment in favor of the United States of America and against Theodore B. Gould . . . in the amount of $1,331,000,[18] App. 35, with a 20-year statute of limitations and concluded that "the United States can execute upon [the judgment] should Gould ever acquire reachable assets," App. 31. The district court conducted a purgation hearing on March 8, 1993, and held:

The precise issue presented is whether Gould has purged himself of contempt by virtue of his inability to comply with this Court's Order of contempt. Inability to comply with an order is ordinarily a complete defense to contempt proceedings. *See United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 1552 (1983);[19] *Newman v.*

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[17] The district judge's finding of fact either shows bias or is based on a lack of commercial practice concerning the financial services provided by banks.

[18] See App. 14-15. [Abstract Judgment]

[19] *United States v. Rylander*, citing *Maggio v. Zeitz*, 333 U.S. 56, 75-76 (1948), and *Oriel v. Russell*, 278 U.S. 358, 366 (1929), held:

> In a civil contempt proceeding . . . a defendant may assert a present inability to comply with the order in question. . . . *Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.* (Emphasis added). It is

Graddick, 740 F.2d 1513, 1528 (11th Cir. 1984). The defense is unavailable, however, where the contemnor created his own inability. *See Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1521 (11th Cir. 1986);[20] *Phoenix Marine Enterprises, Inc. v. One Hylas 46' Convertible Sportfisherman Hull #1*, 681 F.Supp. 1523, 1530 (S.D. Fla. 1988), *aff'd*, 846 F.2d 753 (11th Cir. 1988);[21] *Piambino v. Bestline*

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settled, however, that in raising this defense, the defendant has a burden of production.

[20] *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, concerned a case in which judgment creditors applied to a district court for discovery to determine the disposition of the proceeds of the sale of the property in liquidation of Tedruth Plastics Corporation. The district court entered an order providing for Tedruth's deposition under Fed.R.Civ.P. 30(b)(6), and held Tedruth and its law firm in contempt for failure to comply. The court of appeals held, citing *United States v. Hays*, 722 F.2d 723, 725 (11th Cir. 1984), and *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980), that "where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings," 799 F.2d at 1521.

[21] *Phoenix Marine Enterprises, Inc. v. One Hylas 46' Convertible Sportfisherman Hull #1*, 681 F.Supp. 1523, 1530 (S.D. Fla. 1988), quoting *Piambino b. Bestline Products, Inc.*, 645 F.Supp. 1210, 1215 (S.D. Fla. 1986), held that an "[i]nability to comply with a court order may be a defense to a charge of contempt . . . but not if the defendant created his own inability." In *Phoenix Marine*, the contemnors transferred a security interest in the Hylas 46' vessel to avoid the court's power, and the district court found that the contemnor had "not discharged his burden to show that all reasonable avenues for raising funds have been explored and exhausted in order for him to be excused from compliance with the Court's orders due to inability," 681 F.Supp. at 1528-1529.

Products, Inc., 645 F.Supp. 1210, 1215 (S.D. Fla. 1986).[22] App. 30.

15. On November 17, 1994, the court of appeals affirmed the district court's judgment, in a proceeding in which the United States did not file a brief on the grounds that the United States was not a party in the contempt proceedings, App. 20, and held "Gould's challenges regarding the legality of the order to turn over proceeds and the contempt order have already been presented to this Court and found without merit," App. 21. The court also held that "Gould created his own inability

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[22] *Piambino* concerned contempt fines imposed on lawyers for the reimbursement of attorney's fees paid from the court's registry in accordance with a settlement which the court of appeals had held was unfair to minority members of the plaintiff and "their certain failure on appeal." 645 F.Supp. at 1215. District Judge Marcus held, quoting *United States v. Rylander*, that "the law is clear that this defense is to be measured at the time of the contempt proceedings" and after concluding that "where a contemnor alleges an inability to pay, such inability cannot save him from being found in contempt when contemnor created the inability himself," *Id.* Nevertheless, the district court held that the contemnors would be purged of contempt upon the payment to the court registry of civil contempt fines imposed after the court's determination of their assets and present income. *Id.* at 1216-1217. The district court concluded, quoting *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966), that:

> [s]ince sanctions imposed in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself in compliance, the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself.

to comply with the order to turn over proceeds, resulting in the failure of the purgation defense," App. 21.

16. On December 28, 1998, the district court granted the motion of the United States for the disbursement of $93,198.65, App. 8, derived from an IRS reward to me that had previously been placed in the court's registry, App. 18, and later released to Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, App. 16.

17. On January 26, 1999, the district court denied my Fed.R.Civ.P. 59(a)(2) motion for a new trial on the grounds that "no trial was held in this case," App. 5, and concluded, citing *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), that "[t]he [$1,331,000] fine imposed [in favor of the United States] by Judge Marcus in this case is precisely the type of civil contempt fine described in *International Union*," App. 6.

18. The opinion of the court of appeals based on the "law of the case" doctrine, App. 2, held that the questions of whether "(1) the final judgment entered in favor of the United States was, in actuality, a punitive sanction for criminal contempt, imposed in violation of his right to procedural due process, and (2) the judgment violated the Excessive Fines Clause . . . are substantively identical to those he first raised in his direct appeal of the district court's August 31, 1993, final judgment, and do not relate to the district court's December 28, 1998, order authorizing disbursement of funds to the United States."

REASONS FOR GRANTING THE WRIT

The opinion of the court of appeals, in reliance on the "law of the case" doctrine to sanction a lower court's use of its contempt power without jurisdiction in the administration of the bankruptcy laws, in violation of due process, and to impose an excessive fine on me to vindicate the court's authority, so far departs from the accepted and usual course of judicial proceedings, and this Court's *Holywell* opinion, that this Court's power of supervision should be exercised.

The threshold question presented in this case is the same as in the remanded proceedings, **S.Ct. No. 99-1643** (the court of appeals was required to vacate its prior judgment and remand the proceedings to the district court with instructions that the bankruptcy court dismiss the trustee's complaint for want of jurisdiction), and the question presented in **S.Ct. No. 99-1642** (whether the allowance and estimation of claims involving the Miami Center Liquidating Trust is a core matter), because each case is based on the bankruptcy court's exercise of post-confirmation jurisdiction forbidden by statute. The second question is whether the district court's conduct of the contempt proceedings was a violation of due process. The third question is whether the district court's imposition of a contempt fine in favor of the United States for conduct that benefited the government violated the Excessive Fines Clause.

1. A Bankruptcy Court Lacks Postconfirmation Jurisdiction Concerning the Administration Of A New Liquidating Trust Created Under The Provisions Of A Confirmed Plan.

Prior to the reform of the bankruptcy laws, the jurisdictional rule was that a circuit court lacked jurisdiction of an appeal, and that a district court lacked jurisdiction in a bankruptcy proceeding, if the court found that a trustee was not in possession of a fund derived from the proceeds of the sale of property not in the trustee's possession. Thus, the court lacked authority to enter a turnover order in a summary proceeding, because "we do not think that a court of bankruptcy can create jurisdiction forbidden by statute," *First Nat'l Bank v. Chicago Title & T. Co.*, 198 U.S. 280, 291 (1904).[23] Thereafter, Mr. Justice Holmes expressed this Court's opinion again that "[t]he circuit court of appeals had no jurisdiction in the matter, and the denial of a mandamus . . . did not confer or declare jurisdiction to grant what this Court denied," *Ex Parte First Nat'l Bank of Chicago*, 207 U.S. 61 (1907). *May v. Henderson*, 268 U.S. 111, 115 (1924), held "[i]t is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court"; and

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[23] *Provencher v. Berman*, 699 F.2d 568, 570 (1st Cir. 1983), held, citing 5 A. Scott, ***The Law of Trusts*** (3d ed. 1967), that in response to a breach of trust, an "innocent party can choose either to enforce a lien on the property for the value of the estate's funds or to enforce a constructive trust on the property," and construed *First Nat'l Bank of Chicago v. Chicago Title* to conclude that "contest over title to property [was] not [an] administrative matter." Thus, state law was applicable to a determination of the property's partition.

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 434 (1923), held that "[i]n the absence of possession, there was under the Bankruptcy Act of 1898, as originally passed, no jurisdiction without consent." See *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).[24] See also *In re H.M. Kouri Corporation*, 66 F.2d 241 (2d Cir. 1933).[25]

After the bankruptcy laws were reformed concerning a bankruptcy court's jurisdiction, *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2872, n. 26 (1982), citing *Williams v. Austrian*, 331 U.S. 642 (1947),[26]

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[24] *Magnolia Petroleum* held "[b]ankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title but possession." 309 U.S. at 481.

[25] *H.M. Kouri* held, citing *Taubel-Scott-Kitzmiller* and *First Nat'l Bank of Chicago v. Chicago Title*, that "the bankruptcy court had power to determine the question of possession upon which depended its jurisdiction to make a summary order" and if the court found that the trustee was not in possession of the property, a turnover order was beyond the bankruptcy court's power.

[26] *Williams v. Austrian* held, citing *First Nat'l Bank of Chicago v. Chicago Title*, that "unless by the consent of the defendant, suits by the bankruptcy trustee should be brought only in the courts where the bankrupt might have brought them if bankruptcy proceedings had not been instituted," 331 U.S. at 649, and concluded, quoting *Schumacher v. Beeler*, 293 U.S. 367, 374 (1934), that "[t]he Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits (fraudulent transfers and preferences) and could prescribe the conditions upon which the federal courts should have jurisdiction. . . . Exercising that power, the Congress prescribed in § 23(b) the condition of consent on the part of the defendant sued by the trustee."

held that Northern's prepetition claim to recover contract damages to augment its estate could be "adjudicated in a federal court on the basis of its relationship to the petition for reorganization," but since the matter was a private-rights dispute, Northern's damage claim could not be adjudicated in a bankruptcy court. *Id.* ("[T]he restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights.")

The Bankruptcy Reform Act of 1978 "eliminated the distinction between a bankruptcy court's exercise of jurisdiction in a 'summary proceeding' and 'plenary jurisdiction'," 102 S.Ct. at 2862, and granted powers to the new bankruptcy courts to resolve claims that affected the property of the estate created under 11 U.S.C. § 541(a),[27] including the power to issue declaratory judgments under 28 U.S.C. § 2201, actions to avoid transfers or fraudulent conveyances, claims based on state law, as well as federal law, and the equitable power to issue any

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Nevertheless, this Court held that a district court had jurisdiction to hear, sitting as a court of bankruptcy, lawsuits brought by a disinterested reorganization trustee, that the principle of federalism required to be heard under State law in a local court, without the defendant's consent and for which diversity of citizenship did not exist, because § 23 was eliminated in Chapter X proceedings under the Chandler Act of 1938, *Id.* at 658-661.

[27] 11 U.S.C. § 541, *Property of the estate*, provides, in part: "(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

final order or judgment for the enforcement of title 11's provisions under 11 U.S.C. § 105. Nevertheless, 11 U.S.C. § 1142 limited a bankruptcy court's postconfirmation jurisdiction "to matters concerning the implementation or execution of a confirmed plan," *Goodman v. Philip R. Curtis Enterprises, Inc.*, 809 F.2d 228, 232 (4th Cir. 1987), and a bankruptcy court "cannot write its own jurisdictional ticket" based on a confirmed plan's provision for the retention of postconfirmation jurisdiction, *Zerand-Bernal Group v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994). Furthermore, the necessary implication of this Court's *Holywell* opinion that "[e]ven if § 1141(a) binds creditors . . . with respect to claims that arose before confirmation, we do not see how it can [be] bind[ing] . . . with respect to postconfirmation claims," 503 U.S. at 58, is that a bankruptcy "[c]ourt's post-confirmation authority is restricted only to those matters pending at the time of confirmation," *In re Greenley Energy Holdings of Pennsylvania*, 110 B.R. 173, 182 (Bkrtcy. E.D. Pa. 1990), quoting *Claybrook Drilling Co. v. Divanco*, 336 F.2d 697, 701 (10th Cir. 1964).

After this Court concluded that the broad grant of jurisdiction to the bankruptcy courts under the Bankruptcy Reform Act of 1978 was unconstitutional, the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA") provided that bankruptcy judges have jurisdiction over proceedings only if they have statutory authority. *In re Sequoia Auto Brokers Ltd.*, 827 F.2d 1281, 1284 (9th Cir. 1987); accord, *In re Coporacion de Servicios Medicos Fajardo*, 805 F.2d 440, 443 (1st Cir. 1986).

Under BAFJA, the statutory grant of a district court's jurisdiction in bankruptcy cases and proceedings is found in 28 U.S.C. § 1334, App. 61. Thus, the threshold question in this case is whether the Miami Center Liquidating

Trust must be administered under the laws of the State of Florida, see 5 A Scott, *The Law of Trusts*, § 565 (4th ed.),[28] and, in accordance with § 1334(c)(2), the district court was required to abstain from any cause of action concerning the liquidating trust's property unrelated to the resolution of the trustee's payment of the claims of creditors under title 11. See 503 U.S. at 59 (A "creditor" as used in § 1141(a) [is] . . . an entity with various kinds of preconfirmation claims"). Furthermore, 28 U.S.C. § 157(c)(2), App. 64, codifies the rule that the district court may not refer a proceeding related to a case under title 11 to a bankruptcy judge without the defendant's consent, see 19 *supra*, quoting *Taubel-Scott-Kitzmiller*.

In proceedings concerning a trust, a court cannot render a valid judgment if it does not have jurisdiction over the trustee or over the trust property, 5 A Scott, *The Law of Trusts*, § 565. In this case, it is the law of the case that the trustee was not a Bankruptcy Trustee, or a "trustee in a case under title 11," appointed in accordance with 11 U.S.C. § 1104(a), was not acting as the fiduciary of Gould's bankruptcy estate, 503 U.S. at 55; and the Miami Center Liquidating Trust was *not* a bankruptcy estate created under 11 U.S.C. § 541(a). Thus, the trustee was the holder of the legal title to the trust property, and I was the Miami Center Liquidating Trust's beneficiary as the equitable and beneficial owner. See 5 A Scott, *The Law of Trusts*, § 1.

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[28] § 565 states, in part, that "in the case of any trust, if the administration of the trust is fixed in a particular state, a court of that state has jurisdiction to determine not only what interest the beneficiaries have in the trust property that is within the state, but how far the trustee is or is not subject to personal liability to the beneficiaries for his administration of the trust."

2. The District Court's Prior Contempt Judgment In Favor Of The United States Was Clearly Erroneous And Violated Due Process Of Law.

The opinion of the court of appeals, quoting *United States v. Escobar-Urrego*, 110 F.2d 1556, 1560 (11th Cir. 1997), that the "law of the case" doctrine "is binding at later stages of the same case," unless "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice," App. 2, and "we find no reversible error, *Id.*, is contrary to the fundamental rule that if a court lacks jurisdiction of the subject matter, its judgment is a violation of due process of law.

It is undisputed that the evidence in a subsequent trial was not different in this case, because the district court's contempt judgment in favor of the United States was entered without a trial and my Fed.R.Civ.P. 59(a)(2) motion for a new trial was denied, App. 5.

As previously explained, this Court's *Holywell* opinion is the controlling authority in this case concerning the district court's lack of postconfirmation jurisdiction under the Bankruptcy Code's provisions over the trustee and the Miami Center Liquidating Trust's property, 22 *supra*. In *Messenger v. Anderson*, 225 U.S. 436 (1912), this Court held:

> In the absence of statute, the phrase "the law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen

> what has been decided, not to limit their power. 225 U.S. at 444.

Harris v. Reed, 489 U.S. 255, 263 (1989), held that a "clear and express statement" must be made for a court of appeals to hold that the "law of the case" doctrine barred it from reaching a Due Process issue, and *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922), held that when an appellate court's mandate does not address a particular issue, the issue may be reviewed on a second appeal, because there is a difference between the law of the case and the doctrine of *res judicata*. Thus, the "law of the case" doctrine is applicable only "when a litigant has presented an issue on the first appeal, and it has been fully briefed and squarely decided," Moore's *1B Federal Practice*, § 0.404[1].

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988), held, quoting the test adopted in *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967), that:

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstances, . . . where the initial decision was "clearly erroneous and would work a manifest injustice." 486 U.S. at 817.

Thus, it is clear that an erroneous application of the law does not become correct because it was made by following a previous ruling as the law of the case, and all the law that underlies the judgment is reviewable on appeal, or on a motion for a new trial, *Arizona v. California*, 460 U.S. 616, 618 (1983).

In *Bagwell*, this Court held, citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), that

> whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence in punitive, to vindicate the authority of the court." 114 S.Ct. at 2557.

This Court has also held that a "criminal contempt is a crime in the ordinary sense," *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), and where both civil and criminal relief is imposed, "the criminal feature of the order is dominant and fixes its character for purposes of review," *Hicks v. Feiock*, 485 U.S. 632, 639, n. 10 (1989). A sanction imposed as punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution," *United States v. Chouteau*, 102 U.S. 603, 611 (1881).

It is clear that "[d]irect contempts . . . cannot be punished with serious criminal penalties absent the full protection of a criminal jury trial," 114 S.Ct. at 2560, citing *Bloom*, 391 U.S. at 210.

In this case, the bankruptcy court erroneously exercised its equitable power under 11 U.S.C. § 105(a) to impose a compensatory civil contempt fine for $66,500 against me in favor of Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, App. 54. Further, the bankruptcy court certified the case to the district court under Bankruptcy Rule 9020 for criminal contempt in the bankruptcy judge's presence, App. 57. The district court concluded that "[w]hile the bankruptcy court found Mr. Gould to be in criminal contempt, it appears to intend a coercive as well as a punitive sanction," App. 51. Thus, the proceedings certified to the district court only concerned a criminal contempt and the contempt fines issued

thereafter by the district court in favor of the United States to vindicate the court's authority absent the full protection of a criminal trial, presentment or indictment by a Grand Jury, and were clearly erroneous.

Bagwell, 114 S.Ct. at 2558, held:

> A contempt fine accordingly is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] . . . compensates the complainant for losses sustained." *United States v. United Mine Workers of America*, 330 U.S. 258, 303-304, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947). Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. See *Penfield Co. v. SEC*, 330 U.S. 585, 590, 67 S.Ct. 918, 921, 91 L.Ed. 1117 (1947). Thus, a "flat, unconditional fine" totalling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Id.* at 588.

In this case, the district court's failure to hold a purgation hearing prior to issuance of its contempt order in favor of the United States was a violation of due process, because *Maggio v. Zeitz*, 333 U.S. at 75, has held, citing *Oriel v. Russell*, upon which the district judge relied in *Piambino*, 15, n. 22, *supra, that*

> the turnover order may not be attacked in the contempt proceedings because it is *res judicata* on this issue of possession at the time as of which it speaks. But application of that rule in these civil contempt cases means only that the bankrupt, confronted by the order establishing prior possession, at a time when continuance

> thereof is the reasonable inference, is thereby confronted by a prima facie case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession. . . . But the bankrupt may be permitted to deny his present possession and to give evidence of present conditions or intervening events which corroborate him. . . . The trial court is obliged to weigh not merely . . . that a turnover order has issued and that it has not been obeyed, but all the evidence properly before it in the contempt proceeding in determining whether or not there is actually a present inability to comply and whether failure so to do constitutes deliberate defiance. . . .

3. The District Court's Prior Contempt Judgment In Favor Of The United States Violated The Excessive Fines Clause, And The Court's Order Authorizing As Partial Satisfaction Of The Contempt Fine Payment Of The IRS Reward For The Detection Of Fraud, Arising Out Of This Court's *Holywell* Opinion, Is A Manifest Injustice.

Although the debate concerning the Excessive Fines Clause in the First Congress was limited to a single question, the historical perspective of the Virginia Declaration of Rights of 1776, which was the Eighth Amendment's model, was Article 10 of the English Declaration and Bill of Rights of 1689, which (1) reaffirmed the Magna Carta's protection against excessive amercements – civil and criminal financial penalties imposed by juries for misconduct, and (2) protection against fines imposed by

judges on their own authority, without a jury trial. In this case, the question presented is whether the Excessive Fines Clause is applicable to a nonremedial contempt fine imposed in the guise of a coercive civil contempt payable as a punitive sanction to the government, for the failure to obey a court's order, and a penalty of $1,331,000 that is disproportionate to the damage and costs incurred by the government. See 12, n. 16, *supra* [The government benefited from my conduct.]

In *Browning-Ferris Industries of Vt. v. Kelso Disposal, Inc.*, 492 U.S. 257, 264 (1988), this Court held that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963), held that the punitive nature of a sanction is evident from tests traditionally applied to determine "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."

United States v. Halper, 490 U.S. 435, 448 (1989), held "[s]imply put, a civil as well as a criminal sanction constitutes punishment when the individual case serves the

goals of punishment," and citing *Mendoza-Martinez* for the principle that punishment serves the aims of retribution and deterrence, and thus, "whether [a] sanction appears excessive in relation to its non-punitive purpose is relevant to [the] determination [of] whether [the] sanction is civil or criminal," concluded that

> it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment. *Id.*

In *Austin v. United States*, 509 U.S. 602, 607 (1993), this Court held, quoting *Browning-Ferris*, 492 U.S. at 268, that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government," and concluded that "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense'," *accord*, *Alexander v. United States*, 509 U.S. 544, 558 (1993) (forfeiture remanded for analysis under the Excessive Fines Clause).

In this case, it is not necessary to test whether the district court's imposition of a $1,331,000 fine, plus accrued annual interest, upon which the United States could execute in the future, bears a rational relationship to the goal of compensating the government for its loss, but is instead a "punishment," *United States v. Ursery*, 518 U.S. 267, 283 (1996), and is so large as to be "excessive," *Id.*, because it is uncontroverted and undisputed that the sole purpose of my failure to obey the court's order was to force a trustee to discharge duties imposed by law, and the government suffered no loss. The IRS reward was

partial reimbursement of the expenses incurred to segregate the trustee's commingled accounting and the attorney's fees to defeat the fraudulent scheme of the Bank and trustee to violate tax laws.

The purpose of the contempt fine was to punish and vindicate the district judge's authority. The historical development of the Excessive Fines Clause requires concluding that the district court's conduct was an abuse of judicial power, and the rules for a judge's use of a court's contempt power must preclude the judicial abuse that concerned the Framers when the same person exercises legislative authority to determine the conduct for which fines should be imposed, and the amount of a fine; the executive function of imposing a fine; and the duty of a judge to administer the law and determine whether the fine is excessive. See The Federalist Papers, No. 47 (Madison, quoting Montesquieu).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4093
Non-Argument Calendar

D.C. Docket No. 89-02629-CIV-UUB

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee
of the Miami Center Liquidating Trust,
UNITED STATES OF AMERICA,
HOLYWELL CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(November 26, 1999)

Before TJOFLAT, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Appellant Theodore B. Gould appeals the district court's December 28, 1998, order authorizing disbursement of $93,198.65 to the United States in partial satisfaction of an outstanding final judgment entered against him

in the amount of $1,331,000, stemming from a civil contempt sanction during Appellant's bankruptcy proceeding. On appeal, Appellant argues (1) the final judgment entered in favor of the United States was, in actuality, a punitive sanction for criminal contempt, imposed in violation of his right to procedural due process, and (2) the judgment violated the Excessive Fines Clause of the Eighth Amendment.

The law-of-the-case doctrine provides that "an issue decided at one stage of a case is binding at later stages of the same case." *United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997). The law of the case is not "an inexorable command," but it must be followed unless "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* at 1561 (citing *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967) (footnotes omitted)).

Upon our review of the district court's order, the record on appeal, and the briefs of the parties, we find no reversible error. The issues Appellant raises in this appeal are substantively identical to those he first raised in his direct appeal of the district court's August 31, 1993, final judgment, and do not relate to the district court's December 28, 1998, order authorizing disbursement of funds to the United States. This appeal is therefore barred by the law-of-the-case doctrine.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 99-4093
Non-Argument Calendar

District Court Docket No. 89-02629-CIV

THEODORE B. GULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee
of the Miami Liquidating Trust,
UNITED STATES OF AMERICA,
HOLYWELL CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Nov. 26, 1999)

Before TJOFLAT, BLACK and BARKETT, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the Untied States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiff-appellant pay to the defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 26, 1999

For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAR 16 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE B. GOULD,
Appellant,

vs.

FRED STANTON SMITH,
as Trustee of the Miami
Center Liquidating Trust,
Appellee.

_____/

Case No. 89-2629-CIV-
UNGARO-BENAGES

In re:
HOLYWELL
CORPORATION, et al.,
Debtors.

_____/

ORDER DENYING APPELLANT'S MOTION FOR NEW TRIAL

(Filed Jan. 26, 1999)

THIS CAUSE came before the Court upon the Appellant's Motion for New Trial, filed December 11, 1998.

THE COURT has considered the above-referenced motion and the pertinent portions of the record and is otherwise fully advised in the premises. At the outset it should be noted that the Motion is entitled "Motion for New Trial." However, no trial was held in this case, and therefore the Motion is, in actuality, a Motion for Reconsideration. Accordingly, the undersigned has considered the motion as one seeking reconsideration of the Court's December 2, 1998 Order granting the United States'

Motion for the disbursement of funds in the Court registry.

The Appellant contends that the Court should vacate its December 2, 1998 Order because the $1,331,000 plus interest judgment against him is the result of a criminal contempt fine rather than a civil contempt fine. It follows, he argues, that he may not be held in criminal contempt without a jury trial. To be clear, the undersigned is well aware of the Supreme Court's holding in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). The appellant, however, has misconstrued *International Union* in which the Court distinguished between civil contempt fines, such as the fine imposed in this case, and criminal contempt fines. In fact, the *International Union* Court stated that "[a] contempt fine accordingly is considered civil and remedial if it either 'coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complaint for losses sustained. . . . Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge." *Id.* at 829 (citations omitted). The Court went on to provide an example of a civil contempt fine, describing "a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future indefinite, daily fines are purged." *Id.* The fine imposed by Judge Marcus in this case is precisely the type of civil contempt fine described in *International Union*. The Appellant was fined $1000 per day *until* the sum owed to the trustee was paid. Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that the Appellant's Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of January, 1999.

/s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT
JUDGE

copies provided:
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE B. GOULD, Appellant, v. FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust, Appellee,	)	Case No. 89-2629-CIV-UNGARO-BENAGES AMENDED ORDER GRANTING UNITED STATES' MOTION FOR DISBURSEMENT OF FUNDS (Filed Dec. 28, 1998)
IN RE: HOLYWELL CORPORATION, et al, Debtors.	)	

THIS CAUSE came before the Court upon the United States' Motion for Disbursement of Funds, filed November 13, 1998 and the United States' Motion for Clarification.

THE COURT has considered the pertinent portions of the record and is otherwise fully advised in the premises. It is hereby

ORDERED AND ADJUDGED that the United States' Motion for Disbursement of Funds is GRANTED. Accordingly, in partial satisfaction of the Court's August 31, 1993 Order of Final Judgment, the Clerk of the Court shall disburse to the United States the funds in the amount of $93,198.65, plus accrued interest, if any, currently held in the Court Registry. The Clerk of the Court shall issue a check in the amount of $93,198.65, plus accrued interest,

if any, made payable to the United States Department of Justice and send the check to Assistant United States Attorney Maureen Donlan, 99 N.E. 4th Street, Miami, Florida.

DONE AND ORDERED in Chambers at Miami, Florida, this 24 day of December, 1998.

/s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

cc: Maureen Donlan, AUSA
Herbert Stettin, Esq.
Theodore B. Gould, Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust,

Appellee.

_____/

In re:
HOLYWELL CORPORATION, et al.,
Debtors.

_____/

Case No. 89-2629-CIV-UNGARO-BENAGES

ORDER GRANTING UNITED STATES' MOTION FOR DISBURSEMENT OF FUNDS

(Filed Dec. 2, 1998)

THIS CAUSE came before the Court upon the United States' Motio [sic] for Disbursement of Funds, filed November 13, 1998.

THE COURT has considered the pertinent portions of the record and is otherwise fully advised in the premises. It is hereby

ORDERED AND ADJUDGED that the Defendant's Motion for Disbursement of Funds is GRANTED. Accordingly, in partial satisfaction of the Court's August 31, 1993 Order of Final Judgment, the Clerk of the Court shall disburse to the United States the funds in the amount of $93,198.65 currently in the Court Registry.

DONE AND ORDERED in Chambers at Miami, Florida, this 2 day of December, 1998.

/s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust,

Appellee.

_____/

In re:
HOLYWELL CORPORATION, et al.,
Debtors.

_____/

Case No. 89-2629-CIV-UNGARO-BENAGES

ORDER GRANTING MOTION TO INTERPLEAD FUNDS

(Filed Oct. 13, 1998)

THIS CAUSE came before the Court upon Fred Stanton Smith's Motion to Interplead Funds, filed September 22, 1998.

THE COURT has considered the pertinent portions of the record and is otherwise fully advised in the premises. It is hereby

ORDERED AND ADJUDGED that the Motion to Interplead Funds is GRANTED. Accordingly, the Clerk of the Court is authorized to receive the funds in the amount of $93,198.65 into the Court Registry. It is further

ORDERED AND ADJUDGED that if the United States contends that it is entitled to the funds, it shall file

a motion within 30 days seeking entry of disbursement of such funds.

DONE AND ORDERED in Chambers at Miami, Florida, this 13 day of October, 1998.

/s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

ABSTRACT OF JUDGMENT
NOTICE

Pursuant to Title 28, United States Code, Section 3201, this judgment, upon the filing of this abstract in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of 26 U.S.C. §6323(f), creates a lien on all real property of the defendant(s) and has priority over all other liens or encumbrances which are perfected later in time. The lien created by this section is effective, unless satisfied, for a period of 20 years and may be renewed by filing a notice of renewal. If such notice of renewal is filed before the expiration of the 20 year period to prevent the expiration of the lien and the court approves the renewal, the lien shall relate back to the date the judgment is filed.

Name and address of Parties against whom judgments have been obtained	Names of Parties in whose favor judgments have been obtained
THEODORE B. GOULD 2564 IVY ROAD CHARLOTTESVILLE, VIRGINIA 22901	UNITED STATES OF AMERICA 89-2629-CIV-MARCUS (Filed Oct. 14, 1997)

Amount of Judgment	Names of Creditor's Attorneys	When Docketed
PRINCIPAL= $1,331,00.00 [sic] plus post judgment interest of 3.430% since date of judgment entry, 8/31/93.	WILLIAM A. KEEFER UNITED STATES ATTORNEY SOUTHERN DISTRICT OF FLORIDA 99 N.E. 4TH STREET - 3RD FLOOR MIAMI, FL 33132 ATTN: FINANCIAL LITIGATION UNIT	

UNITED STATES OF AMERICA
CLERK'S OFFICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SS.

I CERTIFY, That the foregoing is a correct **Abstract of the Judgment** entered or registered by this Court.

Dated: Sept. 29, 1997

CARLOS JUENKE, Clerk
By /s/ Warren P. Conden, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE B. GOULD, Appellant, -vs- FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust, Appellee, In Re: HOLYWELL CORPORATION, et al., Debtors.	)	CASE NO. 89-2629-CIV-MARCUS ORDER (Filed Apr. 22, 1995)

THIS CAUSE having come before the Court on the United States and the Trustee's Joint Motion for Transfer of Funds From Court Registry Into Interest Bearing Account and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that the Motion be and the same is hereby granted. The $84,516.82 in the Court Registry shall be released to Fred Stanton Smith, as Liquidating Trustee of the Miami Center Liquidating Trust, to be deposited in an interest bearing savings account at a private financial institution. The account shall be held in the name of Fred Stanton Smith, as Liquidating Trustee of the Miami Center Liquidating Trust. The funds shall remain in the interest bearing account pending further Order of this Court.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 20 day of April, 1995.

/s/ Stanley Marcus
UNITED STATES DISTRICT JUDGE

cc: Theodore B. Gould, *pro se*
Herbert Stettin, Esquire
AUSA Maureen Donlan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2629-CIV-MARCUS

IN RE:

HOLYWELL CORPORATION, et al.,

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust and THE UNITED STATES OF AMERICA,

Appellees.

ORDER

(Filed Nov. 18, 1994)

THIS CAUSE came before the Court upon the Motion of the United States to Deposit Funds in Court Registry, filed October 25, 1994. The Court being fully advised in the premises and there being no objection it is

ORDERED AND ADJUDGED that the Motion be and the same is hereby GRANTED. The $84,000.00 reward from the Internal Revenue Service to Theodore B. Gould shall be placed in the Court Registry.

DONE AND ORDERED at Miami, Florida, this 16th day of November, 1994.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Theodore B. Gould, pro se
Herbert Stettin, Esq.
AUSA Elizabeth Ruf Stein

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-5042
Non-Argument Calendar

D. C. Docket Nos. 89-2629-CIV-SM
84-1590-04-SMW
(Filed Nov. 17, 1994)

IN RE: HOLYWELL CORPORATION,

Debtor.

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of
the Miami Center Liquidating Trust,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 17, 1994)

Before DUBINA, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Appellant Theodore B. Gould appeals the district court order granting the motion to enforce the bankruptcy court's contempt order and challenges the bankruptcy court's order to turn over proceeds from the sale of property to a trust and the bankruptcy court's contempt order and fine for failure to turn over proceeds. Gould's challenges regarding the legality of the order to turn over proceeds and the contempt order have already been presented to this Court and found without merit, and are, therefore, barred. As to the remaining issue, whether the contempt order should not have been enforced because of inability to pay, Gould created his own inability to comply with the order to turn over proceeds, resulting in the failure of the purgation defense.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

v.

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust,

Appellee.
_____/

ORDER OF FINAL JUDGMENT

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.
_____/

THIS CAUSE comes before the Court upon the amended motion by Miami Center Liquidating Trust Trustee to enforce this Court's May 17, 1991 Order finding Appellant Theodore B. Gould in civil contempt of court. Pursuant to the Memorandum Opinion entered on this day, it is hereby

ORDERED AND ADJUDGED that

(1) Final Judgment is entered in favor of the Liquidating Trustee and against Theodore B. Gould in the amount of $67,500.00, representing the amount of the sales proceeds received in the sale of the concrete pumps and related equipment, plus any interest earned on or since the sale of the pumps, less $1,000.00 in expenses

incurred in consummating the sale, and statutory pre-judgment interest at the rate of 12% from August 1, 1989 through the date of this judgment. *See* Fla. Stat. § 687.01 (1989).

(2) Final Judgment is entered in favor of the United States of America and against Theodore B. Gould in the amount of $1,331,000.00. This judgment shall bear interest at the rate prescribed by 28 U.S.C. §1961(a).

(3) The running of the $1000/day civil contempt sanction is terminated as it is no longer coercive.

DONE AND ORDERED in Miami, this 31st day of August, 1993.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

copies to:
Maureen Donlan, AUSA
Theodore B. Gould, pro se
Elizabeth Ruf Stein, AUSA
Herbert Stettin, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO.: 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

v.

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust,

Appellee.

_____/

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.

_____/

MEMORANDUM OPINION AND ORDER OF FINAL JUDGMENT

(Filed Aug. 31, 1993)

THIS CAUSE comes before the Court upon the amended motion by Miami Center Liquidating Trust Trustee to enforce this Court's May 17, 1991 Order (finding Appellant Theodore B. Gould in civil contempt for failure to deliver to the Trustee $66,500 in proceeds from the sale of property of the estate, and imposing a daily fine of $1000.00 per day until the funds were paid) by reducing the fine to a money judgment in favor of the Trustee, and to consider the imposition of incarceration or criminal contempt as a sanction for Gould's willful non-

compliance with the Orders of this Court and the United States Bankruptcy Court. The Bank of New York, a $23 million creditor of the bankruptcy estate by virtue of its status as mortgagee of the Miami Center, has joined in the Trustee's amended motion, and seeks additionally to deny the debtor, Gould, his discharge.

As there is no dispute that final judgment should be entered against Gould as to the proceeds from the sale of the property of the estate plus interest, as well as to the civil contempt fine, final judgment in those amounts shall be entered as set out below. Because the Bank of New York lacks standing to move for a revocation of Gould's discharge, its motion must be denied. To the extent that the Trustee seeks the imposition of criminal contempt sanctions, this Court declines *sua sponte* to proceed with criminal contempt. To the extent that criminal contempt proceedings may be appropriate, the matter should be referred to the United States Attorney for the Southern District of Florida to conduct whatever inquiry or review he may deem to be appropriate.

I.

On August 1, 1989, United States Bankruptcy Court Sidney M. Weaver ordered that debtor Theodore B. Gould would be in contempt of court if he failed to remit to the Liquidating Trustee approximately $65,000 in proceeds from the sale of Property of the Estate. Gould, a chapter 11 debtor, had purchased certain concrete pumps and other equipment, which, upon his filing a petition in Chapter 11, became property of the estate. Pursuant to the Plan of reorganization, the pumps became property of

the Miami Center Liquidating Trust. Gould sold the pumps but did not deliver the proceeds to the Liquidating Trustee as the Trustee had directed Gould, instead, as he represented to Bankruptcy Judge Weaver, he invested them in short-term commercial paper with a brokerage firm the identity of which Gould refused to divulge. *See* Transcript of Hearing before Hon. Sidney Weaver, at 63, 68 (July 27, 1989). The August 1, 1989 Order of the Bankruptcy Court found Gould in contempt if he failed to deliver the funds to the Trustee by August 4, 1989, and imposed a $1,000 per diem fine as a civil contempt sanction to coerce Gould's compliance should he refuse to pay the proceeds to the Trustee pursuant to Judge Weaver's Order.

Gould did not comply, and Judge Weaver certified to this Court that Gould was in contempt on August 14, 1989. After proceedings in this Court, by Order of May 17, 1991, this Court found Gould in civil contempt, ordering Gould to turn over, within seven days, the $67,500 sales proceeds, together with any interest earned, less $1000 in expenses incurred in consummating the sale. The Order advised that failure to comply

> shall result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1000 per day for each day that Mr. Gould may fail to comply.

May 17, 1991 Order at 9.

On June 25, 1991, this Court entered an Order denying motion for rehearing and denying motion for stay. The motion for stay was premised on the then-recent granting of certiorari by the United States Supreme Court

on a lawsuit arising from the same bankruptcy, addressing whether the Trustee is responsible for payment of income taxes on the sale of post-confirmation properties. We had already noted in the May 17, 1991 Order that the tax issue appeared to the Court to be irrelevant to the issue of ownership of the concrete pumps. Gould argued that he could not comply with the order to pay the Trustee since he had used funds which he was required to turn over to the Trustee to pay the law firm of Arnold & Porter to appeal the tax obligation issue. The June 25 Order observed that this representation appeared to conflict directly with those representations made before the bankruptcy court at which time Gould stated that he had invested the proceeds in commercial paper.[1] The Order

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[1] At the July 27, 1989 hearing before the Bankruptcy Court, counsel for the Liquidating Trustee read Mr. Gould's deposition testimony into the record, and Mr. Gould then adopted those statements in open court:

> Q. Did you receive the proceeds in the form of a cashiers check for $67,500, payable to you only?
>
> A. Yes.
>
> Q. Did you keep the proceeds?
>
> Page 10:
>
> A. The proceeds have been invested.
>
> Q. Where is the $67,500 less the thousand dollars present?
>
> A. Invested in GMAC 30 day paper at 9.21 percent interest.
>
> Q. In whose name is the account held?
>
> A. In my name.
>
> * * *

noted further that Gould's statements to the Bankruptcy Court[2] "illustrate his intention to flout any orders of any court requiring him to return the proceeds of the concrete pump sales." Order at 5 (June 25, 1991).

On August 9, 1991, the Liquidating Trustee filed a motion to enforce the May 17, 1991 Order Affirming Finding of Contempt. Consideration of that motion was stayed, however, by the pending appeal to the Eleventh Circuit of the Contempt Order (filed July, 3, 1991).

> THE COURT: Do you find any fault with Mr. Stettin's presentation?
>
> MR. GOULD: No, just to the extent that it's necessary to attribute – to characterize these funds as being taxable income of my bankruptcy estate.
>
> MR. STETTIN: I don't think that is necessary for the determination that I wish the Court to make. I will say it's property of his estate and therefore belongs to the liquidating trust.
>
> THE COURT: Do you have any problem with that?
>
> MR. GOULD: No.

Tr. of Hearing, at 63, 68-69 (July 27, 1989).

[2] Gould stated in his deposition, and adopted those statements as part of the record of the proceedings before Judge Weaver by stipulation in open court, *see* Tr. Of Hearing before Hon. Sidney Weaver, at 68 (July 27, 1989), that:

> I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void.

Id. at 64-65.

The United States Court of Appeals for the Eleventh Circuit affirmed the May 17, 1991 Contempt Order *per curiam without opinion* on July 6, 1992. The Court of Appeals then denied petition for rehearing and suggestion for rehearing *en banc* on Sept. 3, 1992. On Oct. 15, 1992, the Court of Appeals denied Gould's motion for stay or recall of the mandate pending petition for writ of certiorari.

The Liquidating Trustee renewed its motion to enforce by filing the instant Amended Motion to Enforce May 17, 1991 Order Affirming Finding of Contempt. The Trustee notes that the $1000 per day fine totalled $1,136,000 as of the date of the filing of the motion (September 10, 1992), and asks that the fine be reduced to a money judgment in favor of the Trustee and against Gould individually, and also asks the Court to reserve jurisdiction to consider incarceration as punishment for the misrepresentation Gould made to the Court about what he did with the proceeds. The Bank of New York is a creditor of the Liquidating Trust, and has joined in the Trustee's motion to enforce, moving additionally for revocation of Gould's bankruptcy discharge.

A purgation hearing was held by this Court on March 8, 1993 at which time Gould asserted that he had no assets with which to pay the amount owing to the Trustee and therefore was unable to purge himself of the contempt; accordingly, he sought an order purging or vacating the contempt Order. The Trustee then sought leave to depose Gould in aid of execution, which leave was granted, and deposition taken on March 18, 1993.

At the March 24, 1993 hearing, both the Trustee and Gould agreed that there was no dispute that Gould had failed to comply, but at the present time did not have the funds to pay the Trustee and was therefore unable to comply. *See* Transcript of Hearing Before Hon. Stanley Marcus, at 11-13. Consequently, the Trustee suggested that the civil contempt sanction of a fine was no longer coercive, and that even incarceration would not produce compliance. The Trustee urged the Court to enter final judgment against Gould in the amounts owing to the Trustee and the United States of America, and requested that the Court consider imposing criminal contempt as a sanction for Gould's willful disobedience of valid Orders of the [sic] this Court and the Bankruptcy Court.

II.

The precise issue presented is whether Gould has purged himself of contempt by virtue of his inability to comply with this Court's Order of contempt. Inability to comply with an order is ordinarily a compete defense to contempt proceedings. *See United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 1552 (1983); *Newman v. Graddick*, 740 F.2d 1513, 1528 (11th Cir. 1984). The defense is unavailable, however, where the contemnor created his own inability. *See Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1521 (11th Cir. 1986); *Phoenix Marine Enterprises, Inc. v. One Hylas 46' Convertible Sportfisherman Hull #1*, 681 F.Supp. 1523, 1530 (S.D. Fla. 1988), *aff'd*, 846 F.2d 753 (11th Cir. 1988); *Piambino v. Bestline Products, Inc.*, 645 F. Supp. 1210, 1215 (S.D. Fla. 1986).

Here, Gould created his own inability to comply by using the proceeds from the sale of the concrete pumps to pay the law firm of Arnold & Porter for the prosecution of the appeal of an unrelated issue in the bankrutpcy [sic] case. On more than one occasion, Gould himself represented to this Court that he used the funds to pay Arnold & Porter. *See, e.g.*, Tr. of Hearing at 43 (March 24, 1993). Furthermore, Gould himself offered the affidavit of one Edgar Schumacher, Jr. the "informal tax CPA for Theodore B. Gould and his wife Helen," who swore under oath that

> The net sale proceeds from the sale of the concrete pumps were deposited by Mr. Gould in his business checking account at Crestar bank and were subsequently paid out to retain and pay initial Arnold & Porter legal fees incurred in taing [sic] the income tax case into the United States Supreme Court.

Schumaker [sic] Aff. at ¶¶ 2, 7.

We find that at present, Gould is unable to pay and thereby purge himself of civil contempt. Therefore further amassing of the $1000 per day fine is unavailing and no longer coercive. Thus, the running of the daily find should be terminated, and the outstanding balance reduced to a judgment which the United States can execute upon should Gould ever acquire reachable assets.

There being no real dispute that Gould himself created his inability to deliver the proceeds from the sale of the concrete pumps to the Trustee pursuant to the valid Orders of the Bankruptcy Court and this Court, we cannot find cause to reward his conduct by vacating the formal order of contempt. Although the sanction that

accompanies a finding of civil contempt usually takes the form of incarceration or a fine, several courts have issued civil contempt orders "standing alone." *See e.g., Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6 (N.D. Ill. 1986) (adjudging civil defendant in contempt for failure to comply with a trial subpoena duces tecum, but declining to impose any sanctions at all since the trial was over and since plaintiff had not shown that he suffered any monetary damages); *United States v. Professional Air Traffic Controllers Organization*, 678 F.2d 1, 5 (1st Cir. 1982) (holding that a "bare finding of civil contempt may stand"). While Mr. Gould is unable to comply, the sanction of a fine or incarceration can no longer be said to be coercive and any further sanction as a means of coercing compliance with the Court Orders would be ineffectual and therefore would be purely punitive in nature. On this record, however, we cannot find that Mr. Gould has purged himself of civil contempt.

The Trustee has moved this Court to consider the commencement of criminal contempt proceedings as a sanction for Gould's willful noncompliance. We decline the Trustee's invitation to proceed *sua sponte* with criminal contempt proceedings. To the extent that criminal contempt proceedings may be appropriate, the matter should be presented to the United States Attorney for the Southern District of Florida for whatever review or inquiry he may deem appropriate.[3]

---

[3] The Trustee has suggested that a charge of criminal contempt is employ supported by the record. For example, the Schumacher Affidavit submitted by Gould indicates not only that the proceeds were ultimately used to pay Arnold & Porter,

III.

The Bank of New York's request that Gould be denied his discharge is somewhat misplaced. A bankruptcy court may deny the debtor a discharge where the debtor has disobeyed a court order. The relevant Bankruptcy Code provision reads:

> The court shall grant the debtor a discharge, unless –
>
> * * *
>
> (6) the debtor has refused, in the case –
>
> (A) to obey any lawful order of the court, other than an order to respond to a material question, or to testify. . . .

11 U.S.C. §727(a) (6).[4] Obviously, Gould has refused to obey lawful orders of the Bankruptcy Court and of this

---

but also that the proceeds were deposited by Gould "into his business checking account." Schumaker [sic] Aff. at ¶ 7. This appears to conflict directly with Gould's representation to the Bankruptcy Court that the proceeds were invested into commercial paper. Tr. at 63, 68 (July 27, 1989). Aside from this discrepancy in Gould's sworn statements, the record indicates his firm intention to flout the valid Order of the Bankruptcy Court to turn over the proceeds of the concrete pump sales. *See supra*, Note 2. Even accepting – solely for the sake of argument – Gould's representation that he invested the proceeds in commercial paper, a searching review of the transcript of the hearing held by Judge Weaver reveals no representation by Gould that he planned to redeem the instrument and *expend* the very funds at issue in order to appeal the income tax liability question the resolution of which he stated he would await before complying with Judge Weaver's Order.

[4] Although that provision falls within Chapter 7, it is applicable to a Chapter 11 case through § 1141(d) (3) (C) which

Court. The Bankruptcy Court did not deny the discharge, although under the statute it could have, and instead certified Gould in civil contempt. Of course, questions of law or mixed questions of law and fact must be determined independently by the district court, *see* Bankr. Rule 8013, but we are unable to find any case in which the district court itself revoked a discharge *sua sponte*, i.e., where the bankruptcy court had not already done so. The cases cited by Bank of New York are not to the contrary, but merely stand for the proposition that it is within the bankruptcy court's power to deny or revoke a discharge where the debtor has disobeyed a court order. *Kershaw v. Behm*, 81 B.R. 897 (M.D. Tenn. 1988); *In re Richardson*, 67 B.R. 624 (Bankr. W.D. Mo. 1986); *In re Sweigard*, 35 B.R. 676 (Bankr. N.D. Ohio 1983).

The decision in *In re Curry*, 99 B.R. 409 (Bankr. N.D. Ill. 1989), suggests that "[w]hen a Chapter 11 plan is confirmed and the debtor fails to pay, the creditor's remedy is not to seek a revocation of the discharge, but rather to enforce the debtor's obligation to the creditor arising out of the Chapter 11 proceedings." *Id.* at 410. Certainly the debtor here has done worse than merely "failed to pay" according to the Plan. Gould has flouted a court order. The remedy for a chapter 11 creditor who did not receive a scheduled payment would be to sue to reduce the payment to a money judgment. Bank of New York, however, is a creditor of the *Trust* and was not entitled to payment of the $66,000 at issue directly from *Gould*, so

---

states that the reorganization will not act as a discharge if "the debtor would be denied a discharge under Section 727 if the case were a case under Chapter 7." 11 USC § 1141(d) (3) (C).

the Bank of New York would not have standing to sue on that indebtedness.

It is therefore

ORDERED AND ADJUDGED that the amended motion to enforce contempt is GRANTED AS FOLLOWS:

(1) Final Judgment shall be entered in a companion order in favor of the Liquidating Trustee and against Theodore B. Gould in the amount of $67,500.00, representing the amount of the sales proceeds received in the sale of the concrete pumps and related equipment, plus any interest earned on or since the sale of the pumps, less $1,000.00 in expenses incurred in consummating the sale, and statutory prejudgment interest at the rate of 12% from August 1, 1989 through the date of this judgment. *See* Fla. Stat. § 687.01 (1989).

(2) Final Judgment shall be entered in an additional order in favor of the United States of America and against Theodore B. Gould for [sic] in the amount of $1,331,000,00. This judgment shall bear interest at the rate prescribed by 28 U.S.C. §1961(a). This amount is the outstanding balance of the civil contempt fine imposed against Theodore B. Gould at the rate of $1,000 per day for failure to comply with the Orders of the Bankruptcy Court and this Court to turn over the proceeds from the sale of the concrete pumps. The penalty is calculated from August 1, 1989 through March 24, 1993, the date of the last hearing on this matter.

(3) The running of the $1000/day civil contempt sanction is terminated as it is no longer coercive.

It is further ORDERED AND ADJUDGED that the motion of the Bank of New York to revoke Gould's bankruptcy discharge is DENIED for lack of standing.

DONE AND ORDERD in Miami, this 31st day of August, 1993.

/s/ Stanley Marcus
UNITED STATES DISTRICT JUDGE

copies to:
Maureen Donlan, AUSA
Theodore B. Gould, pro se
Elizabeth Ruf Stein, AUSA
Herbert Stettin, Esq.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

D.C. Docket No. 89-2629-CIV-SM
D.C. Docket No. 84-1590-94-SMW

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(July 6, 1992)

BEFORE BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust,

Appellee.

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

---/

ORDER DENYING STAY AND REHEARING

THIS CAUSE comes before the Court upon Appellant Theodore B. Gould's Motions for Stay, Rehearing, and Granting Judicial Notice. For the reasons detailed below, the Motion for Stay is DENIED, the Motion for Rehearing is DENIED, and the Motion for Granting Judicial Notice is GRANTED. By Order entered on May 17, 1991, we granted the Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, and we specifically directed Mr. Gould to comply with the August 1, 1989 Order of the Bankruptcy Court in so far as it directed him to turn over to the Liquidating Trustee $67,000 in sales proceeds received in the sale of certain concrete pumps and related equipment, together with any interest earned on or since the time of sale, less $100 in expenses incurred

in consummating the sale. Mr. Gould was directed to comply with the Order of May 17 within seven days.

Appellant's Motion for Stay is now promised on the granting of a writ of certiorari issued by the Supreme Court on May 28, 1991. The Supreme Court granted certiorari on a lawsuit arising from the same bankruptcy proceedings which are the foundation of the instant case. *See In re Holywell Corporation*, 911 F.2d 1539 (11th Cir. 1990), *cert. granted Holywell Corp. v. Smith*, 114 L.Ed.2d 476, 59 U.S.L.W. 3793 (1991). On appeal from the bankruptcy court, the federal district court determined that a liquidating trustee was not required by the provisions of a confirmed amended Plan of Reorganization nor by statutory provisions to file tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties. The Eleventh Circuit Court of Appeals affirmed the district court. The Supreme Court agreed to consider that question. However, the tax issue, we believe, lies outside the focus of the instant action and the May 17 Order of this Court. As we stated in our Order of May 17, 1991, "[t]he question of whether the Trust must pay taxes is not relevant to the issue of ownership of the concrete pumps." Order at 6. We did *not* premise our contempt order upon the bankruptcy court's "agreement with the trustee that he is not responsible for the payment of the federal income taxes," Appellant's Motion for Stay at 3. Nor did we hold that the bankruptcy court had so premised its certification of contempt. *Id.* Rather, we stated clearly and unambiguously that Appellant was to be held in contempt because "Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee

and in direct violation of a court order." *See* Order of May 17, 1991, at 6.

Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr. Gould then brings an action for breach of fiduciary duty against the Liquidating Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the asserts [sic] for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in *civil* contempt of court and directed to comply. We have heard nothing new or different and accordingly, we believe the Motion for Stay should be DENIED.

We also note that Mr. Gould has failed to address the ordinary requirements for obtaining a stay. *See Garcia-Mir v. Meese,* 781 F. 2d 1450 (11th Cir. 1986). These criteria include: (a) whether the movant has demonstrated a likelihood of success on the merits; (b) whether the movant has a [sic] made a showing of irreparable injury if the stay is not granted; (c) whether the non-moving party will be injured if the stay is granted; and (d) whether the public interest will be served by granting the stay. All four requirements must be met. Mr. Gould does not meet

even the first. Given that he has admitted that he took the property of the Trust without permission and that he diverted proceeds from the sale of such property for his personal use, he has little likelihood of success on reversing the contempt order. On this basis alone we would deny the motion for stay. In addition, we note that no stay should be granted unless it is conditioned on the posting of a supersedeas bond for the amount of the sale proceeds plus twice the statutory rate of interest. *See* Fed. Rule of Civ. P. 62(d); Fla. R. App. P. 9.310(b)(2); Fla. Stat. § 55.03 (1981). *See also Sterling v. Blackwelder,* 405 F.2d 884 (4th Cir. 1969) (appeal from order confirming judicial sale was dismissed as moot for failure to comply with this rule allowing appellant to obtain a stay by giving a supersedeas bond); *United States v. Jenkins,* 153 F. Supp. 636 (S.D. Ga. 1957) (Defendant who appealed from judgment but did not tender supersedeas bond in amount of judgment subjected himself to action brought by plaintiff to enforce judgment while appeal was pending in court of appeals and in the United States Supreme Court.).

We add that Mr. Gould's statement that he cannot comply with the Court's Order because he has used the funds which he was required to return to appeal the tax obligation issue has no bearing on the basis for which Mr. Gould was held in contempt. Furthermore, such representation conflicts directly with those he made in proceedings before the bankruptcy court at which time he stated that the proceeds from the sale of the concrete pumps had been invested "in GMAC 30 day paper at 9.21 percent interest." Transcript from Hearing of Fred Stanton Smith, Trustee, on Motion for Contempt, July 27, 1989, at 63, lines 15-19. At the same hearing, Mr. Gould refused to

identify the brokerage firm at which the account was held. *Id.* at lines 24-25. Mr. Gould next stated that

> I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void.

Id. at 64-65. No where does Mr. Gould indicate that he planned to *expend* the very funds at issue to appeal the question the resolution of which he stated would await before turning over the funds. His comments in bankruptcy court almost two years ago illustrate his intention to flout any orders of any court requiring him to return the proceeds of the concrete pump sales. We find no basis in Mr. Gould's Motion for Rehearing to alter our Order of May 17, 1991. Finally, as the above discussion indicated, this Court has taken notice of the grant of certiorari by the Supreme Court in *Holywell Corp. v. Smith*, 911 F.2d 1539.

Accordingly, for the foregoing reasons,

Theodore B. Gould's Motion for Stay is DENIED, his Motion for Rehearing is DENIED, and his Motion for Granting Judicial Notice is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of June, 1991.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES
DISTRICT JUDGE

Copies provided:

Theodore B. Gould
Harvey Ziegler
Vance E. Salter
Herbert Stettin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2629-CIV-MARCUS

THEODORE B. GOULD

Appellant,

vs.

FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust

Appellee

_____/

IN RE: HOLYWELL CORPORATION et al.

Debtors

_____/

ORDER

THIS CAUSE comes before the Court upon Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, for an Order confirming the Bankruptcy Court's Order Finding Theodore B. Gould in Contempt, dated August 1, 1989.

On August 1, 1989, the United States Bankruptcy Court for the Southern District of Florida found Theodore B. Gould in contempt of court if he failed and refused to deliver over certain monies as ordered by August 4, 1989. *See* Order Finding Theodore B. Gould in Contempt, August 1, 1989, Case No. 84-01590-BKC-SMW, 84-01591-BKC-SMW, 84-01592-BKC-SMW, 84-01593-BKC-SMW, 84-01594-BKC-SMW, para. 8. On Aug. 14, 1989, the United States Bankruptcy Court certified to this Court that Theodore Gould was in contempt for his failure to comply with the Order of August 1, 1989. Such certification was

issued as provided in Rule 9020, Rules of Bankruptcy Procedure, and directed that Mr. Gould be punished as provided in the Order of August 1, 1989.

This Court conducted a hearing on December 14, 1990, concerning whether Mr. Gould was in contempt of Court for the reasons set forth in the decisions of the bankruptcy court. The relevant facts are as follows:

In October 1981, Theodore B. Gould purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became the property of his estate pursuant to 11 U.S.C. §541(a). Thereafter, and pursuant to the terms of the confirmed bankruptcy plan of reorganization, the concrete pumps and related equipment became the property of the Miami Center Liquidating Trust. *See* Order Finding Theodore B. Gould in Contempt at 1-2. In 1989, Mr. Gould was contacted by Mr. Lawrence G. McMillan who was interested in buying the concrete pumps and related equipment. Before the sale was consummated, Mr. Gould was notified that the Liquidating Trustee claimed the right to receive the sale proceeds. Mr. Gould refused to allow the sale proceeds to be paid to the Liquidating Trustee, insisting that the contract for the sale of the concrete pumps and related equipment be made in his name alone, and that payment be paid to him. *Id.* By agreement dated June 2, 1989, Mr. Gould contracted to sell the pumps and equipment to Mr. McMillan for $67,500. The funds were paid to Mr. Gould, without the consent of the Liquidating Trustee. *Id.*

Under the bankruptcy court's August 1, 1989 Order Finding Theodore B. Gould in Contempt, Mr. Gould was

required to turn over net proceeds from the sale of trust property. If Mr. Gould failed to comply by August 4, 1989, a $1000/day fine was to be imposed until the proceeds were turned over. The bankruptcy court further found Mr. Gould to be in violation of its Order and concluded that Mr. Gould should also be punished by a period of incarceration not to exceed ten (10) days. Moreover, the bankruptcy court concluded that Mr. Gould was found to be in criminal contempt in that Mr. Gould's failure to comply with the courts' orders was done in the presence of the court, and that Gould announced his intention not to comply. Funds from the sale are presently held by Mr. Gould in his name at a brokerage firm and have been invested in short-term commercial paper, according to Mr. Gould. He refuses to reveal the brokerage firm and refuses to turn the money over to the Trustee. He has stated he will not obey any order of the bankruptcy court to do so. *Id.*

In Mr. Gould's Reply to the Liquidating Trustee's Response to Objections to Certification of Contempt, he contends that (1) the bankruptcy court lacks post-confirmation jurisdiction over Mr. Gould; (2) the Liquidating Trustee was illegally appointed and therefore had no right to pursue this matter; (3) Mr. Gould is not required to turn over the proceeds from the sale of the concrete pumps because the Miami Center Liquidating Trust has evaded its tax obligations; and (4) the concrete pumps were not an asset of the Miami Center Liquidating Trust.

We address each of Mr. Gould's arguments in turn. First, the bankruptcy court does not lack post-confirmation jurisdiction over him. Article XIV of the confirmed

plan of reorganization explicitly provides that the bankruptcy court retains jurisdiction over Mr. Gould and his co-debtors in order to enter any order necessary or appropriate to enforce the plan.[1] The reorganization plan is confirmed and is the law of this case. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D.Fla. 1986), *dismissed sub nom, Miami Center Liquidating Trust v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed. 2d 46 (1988). The plan is binding on Mr. Gould, pursuant to 11 U.S.C. §1142.

Next, Mr. Gould argues that the concrete pumps are not assets of the Miami Center Liquidating Trust because they were not specially itemized as trust assets by the confirmed plan and thus reverted to him upon the confirmation of the plan. However, the reorganization plan

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[1] Article XIV, Retention of Jurisdiction, states specifically:

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan have been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contigent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

as confirmed states clearly and unambiguously that *all* of the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code,[2] are assets of the Miami Center Liquidating Trust. *See* Article V of the plan.[3] The concrete pumps are Section 541(a) assets and the plan's provisions are binding. *See* 11 U.S.C. §1142.

Third, Mr. Gould claims that the Liquidating Trustee cannot pursue this matter because the Trustee was appointed illegally in derogation of the Bankruptcy Code. Article V of the plan, however, provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to implement the plan.[4] Mr. Gould's

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[2] 11 U.S.C. Section 541(a)(1) includes as estate assets: "Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."

[3] Article V, Creation of Trust, states:

(1) A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court . . . is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors . . . to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust."

(2) On the Effective Date, all right, title, and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however,* to all existing liens, mortgages, security interests and encumbrances.

[4] *See* note 3, *supra*.

attempt to appeal the plan was not successful. *See Holywell v. Bank of New York*, 59 Bankr. 340. The Liquidating Trustee was appointed by order dated August 12, 1985; that order was not appealed by Mr. Gould or anyone else.

Finally, Mr. Gould asserts that he need not turn over the concrete pumps sale proceeds because the Miami Center Liquidating Trust refuses to pay certain income taxes. The question of whether the Trust must pay taxes is not relevant to the issue of ownership of the concrete pumps. Moreover, the Eleventh Circuit Court of Appeals has determined that the Trust does not have the tax obligations Mr. Gould seeks to impose. *See In re Holywell*, 911 F.2d 5071 (11th Cir. 1990).

In sum, none of the grounds argued by Mr. Gould demonstrate that he should not be certified to be in contempt. We have conducted a de novo review of the record in this case, as required under Bankruptcy Rule 9033(d). After so doing, we accept the findings of fact and conclusions of law of the Bankruptcy Court. Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation of a court order.

The only remaining question is whether Mr. Gould's actions amount to civil or criminal contempt or both. The Bankruptcy Court stated that it was finding Mr. Gould in contempt under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure. Rule 9020 governs criminal contempt proceedings and indeed, in its order finding contempt, the Bankruptcy Court applied Rule 9020 because when ordered to comply by the Bankruptcy Court on July

27, 1989, Mr. Gould announced in the presence of that court his intention not to do so.[5] However, the nature of

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[5] Rule 9020 is entitled "Criminal Contempt Proceedings" and provides as follows:

> (a) Contempt committed in presence of bankruptcy judge
>
> Contempt committed in the presence of a bankruptcy judge may be determined summarily by the bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.
>
> (b) Other contempt
>
> Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state a time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.
>
> (c) Service and effective date of order; review
>
> The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files with the clerk objections prepared in the manner provided in Rule 9033(b). If timely objections

the bankruptcy court Order – imposition of a $1000/day fine until such time as Mr. Gould complies – is more characteristic of a civil contempt finding.

The Supreme Court has said that the words used by the lower court to describe the contempt are not determinative. *Shillitani v. United States*, 384 U.S. 364, 369, 86 S.Ct. 1531, 1535, 16 L.Ed. 2d 622 (1966). The same actions by a party can amount to both civil and criminal contempt. *United States v. United Mine Workers*, 330 U.S. 258, 299, 67 S.Ct. 677, 698-99, 91 L.Ed. 884 (1947). It is the nature and purpose of the punishment that is determinative. *Id.* at 297, n. 64 (citations omitted), *Hicks v. Feiock*, 108 S.Ct. 1423, 1429-31 (1988). The commonly stated distinction is that "if the penalty is to compensate the complaining party or to coerce the defendant into complying with the court's orders, the contempt is civil, while if the penalty is punitive, intended to vindicate the authority of the court, then the contempt is criminal." *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781-82 (8th Cir. 1987), *citing United Mine Workers*, 330 U.S. at 302-04. *See also Latrobe Steel Co. v. United States Steelworkers of America*, 545 F.2d 1336, 1343 (3rd Cir. 1976). As a result, "the penalties arising out of adjudications of criminal contempt are generally an absolute fine of a specific amount or a determinative period of confinement." *Id.*

While the bankruptcy court found Mr. Gould to be in criminal contempt, it appears to intend a coercive as well as a punitive sanction. While we adopt the Bankruptcy

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are filed, the order shall be reviewed as provided in Rule 9033.

Court's findings, we now find Theodore B. Gould to be in *civil* contempt of court.[6] *See Shillitani*, 86 S.Ct. at 1535 (parties had briefed the issues with reference to criminal contempt, but "the contempt orders were remedial, and therefore might well be deemed civil in nature rather than criminal.")

By the order of this Court we direct Mr. Gould to comply fully with the August 1, 1989 Order of the Bankruptcy Court in so far as it directed him to turn over to the Liquidating Trustee the $67,500 sales proceeds received in the sale of the concrete pumps and related equipment, together with any interest earned on or since the time of the sale, less $1000 in expenses incurred in consummating the sale. Mr. Gould shall comply with the terms of the Order of this Court within *seven* (7) days of the date of this order. The failure to comply fully and timely with the Order of this Court shall result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1000 per day for each day Mr. Gould may fail to comply. It is therefore

ORDERED and ADJUDGED that the Motion by Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust, is hereby GRANTED and Mr. Gould is directed to comply with the Order of this Court in the manner prescribed by this Court.

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[6] We take no position *at this time* on the merits of a criminal contempt finding with respect to Mr. Gould.

DONE AND ORDERED at Miami, Florida, this 17 day of May, 1991.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

Theodore B. Gould
2564-B Ivy Road
Charlottesville, VA 22901

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.
_____/

ORDER FINDING THEODORE B. GOULD IN CONTEMPT

THIS CAUSE having come on to be heard on July 27, 1989, upon Motion for Contempt and other relief filed by the Liquidating Trustee, and the Court having reviewed the pleadings on file, having heard argument of counsel, and having reviewed a stipulated set of facts agreed to by the parties involved, and being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED as follows:

1. In October 1981, THEODORE B. GOULD purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became property

of his estate pursuant to 11 U.S. Code, Section 541(a). Thereafter, pursuant to the terms of the confirmed Plan of Reorganization, the concrete pumps and related equipment became the property of the MIAMI CENTER LIQUIDATING TRUST.

2. In 1989, THEODORE B. GOULD was contacted by Lawrence G. McMillan, who was interested in buying the concrete pumps and related equipment. Before the sale was consummated, MR. GOULD was notified that the Liquidating Trust claimed the right to receive the sale proceeds. MR. GOULD refused to allow the sale proceeds to be paid to the Liquidating Trustee and insisted the contract for for the sale of the concrete pumps and related equipment be made in his name, and that payment for the concrete pumps and related equipment be paid to him.

3. Thereafter, by Agreement dated June 2, 1989, THEODORE B. GOULD contracted to sell the concrete pumps and related equipment to Lawrence G. McMillan for $67,500.00. The funds were paid to MR. GOULD

4. The funds are presently held by MR. GOULD in his name at a brokerage firm and have been invested in short-term commercial paper. MR. GOULD refuses to reveal the brokerage firm refuses to turn the money over to the Trustee and has stated he will not obey any order of this Court to do so.

5. Upon the foregoing facts, the Court finds and determines that THEODORE B. GOULD is required to turn over to the Liquidating Trustee the $67,500.00 sale proceeds received, together with any interest earned, less $1,000.00 in expenses incurred in consummating the sale, together with any interest that may have been earned on

the sale by no later than 5:00 P.M. on Monday, July 31, 1989.

7. If MR. GOULD should fail to deliver to the Liquidating Trustee the funds described above, then in that event the Court fines THEODORE B. GOULD the sum of $1,000.00 for each day from and including August 1, 1989, until the funds are delivered as ordered. The fine will continue until the Order is obeyed. The fine is payable into the Court Registry. The Court finds and determines the imposition of this fine is a reasonable and necessary means of enforcing this Order, given the persistent and deliberate refusal of the Defendant, THEODORE B. GOULD to obey the Order of this Court and the frustration of the Liquidating Trustee's ability to perform his functions as Trustee. See *United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); and in re: *Chase and Sandborn Corp.* F.2d (11 Cir. May 1989) (slip sheet opinion at pages 2365-66).

8. If THEODORE B. GOULD shall fail and refuse to deliver over the monies as ordered by Friday, August 4, 1989, then in that event, in addition to the $1,000.00 a day fine referred to above, the Court further finds and certifies to the United States District Court that THEODORE B. GOULD is in contempt of this Court and its Orders by his failure and refusal to comply with its Orders concerning payment of monies to the Trustee. THEODORE B. GOULD should be punished by the continued imposition of the fine set out in this Order and by a period of incarceration not to exceed ten (10) days (or until compliance, whichever first occurs).

9. The Court further finds and determines this certification is for a contempt committed both under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure in that THEODORE B. GOULD was in the presence of the Court and was ordered to comply by the Court on July 27, 1989, and has announced his intention not to do so.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida this 1 day of August, 1989.

/s/ _____
SIDNEY M. WEAVER
United States
Bankruptcy Judge

Herbert Stettin, Esquire, upon receipt will immediately mail conformed copies of this Order to all attorneys of record.

MS 8-2-89 illegible

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4093-DD

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, UNITED STATES OF AMERICA, HOLYWELL CORPORATION,

Defendant-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed March 2, 2000)

(Opinion ___, 11th Cir., 19___ ___F.2d___).

Before: TJOFLAT, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan M. Black
UNITED STATES CIRCUIT JUDGE

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. The Eighth Amendment of the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS INVOLVED

1. Section 1334 of Title 28, Unite States Code, Judiciary and Judicial Procedure, provides:

28 U.S.C. § 1334. ***Bankruptcy cases and proceedings.***

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of

appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the property of the estate.

2. Section 157 of Title 28, United States Code, judiciary and Judicial Procedure, provides, in part:

28 USCS § 157. ***Procedures.***

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

3. Section 1141 of Title 11, Bankruptcy Code of 19878, as amended, provides:

11 USCS § 1141. ***Effect of confirmation***

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not –

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.